IN THE

Supreme Court of the United States

OCTOBER TERM—1939.

No. 240.

FRANK CARMINE NARDONE, NATHAN W. HOFFMAN and ROBERT GOTTFRIED,

Appellants,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF NATHAN W. HOFFMAN, APPELLANT.

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On Writ of Certiorari to United States Circuit Court of Appeals for the Second Circuit,

Brief of Appellant, Hoffman.

Opinions Below.

The District Court (Southern District of New York, CLANCY, *J.*) did not render an opinion. The opinion of the Circuit Court of Appeals is reported in 106 Fed. (2nd) 41.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 20, 1939. The petition for certiorari was filed on the same day and was granted on October 10, 1939.

Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

The Court in granting the writ limited it to these questions:

1. Whether the Trial Court correctly disposed of petitioner's claim that a portion of the respondent's evidence was procured through the illegal interception of telephone and telegraph messages; and

2. "The question of the propriety of a preliminary inquiry to ascertain that fact."

Under Section 240 (a) of the Judicial Code, the Court is not limited to a review of those questions certified when the petition for the writ was granted (*Olmstead* v. *U. S.*, 277 U. S. 488). Accordingly, on behalf of the appellant Hoffman, it is respectfully submitted that a further question is worthy of the consideration of the Court. That question is:

3. Whether the respondent proved a *prima facie* case on any count of the indictment against appellant Hoffman.

The Statute Involved.

Section 605, Title 47, U. S. C. A., 48 Stat. 1103 (June 19, 1934).

No person receiving or assisting in receiving or transmitting or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect

or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing offices of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information as so obtained shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information herein contained for his own benefit or for the benefit of another not entitled thereto; Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Statement.

These appellants, other than appellant Hoffman who was named as a conspirator but not a defendant, were first indicted on May 15, 1936, charged with smuggling of alcohol into the Port of New York on March 17, 1936, the

subsequent concealment of that alcohol, and conspiracy to effect these substantive crimes. The judgment of conviction was reversed (302 U. S. 379) because evidence was admitted disclosing the contents of certain telephone conversations intercepted by Government agents acting, this Court held, in violation of the provisions of Section 605 of the Communications Act of 1934. A superseding indictment was filed on July 7, 1938, identical in all respects with the original indictment, except for the inclusion of the appellant Hoffman as a defendant. The trial jury rendered a verdict of guilty on all counts as against all defendants, including these three appellants, on March 23, 1939.

A sentence of imprisonment was imposed on each appellant. Bail pending appeal to the Circuit Court of Appeals was denied by the District Court and by the Circuit Court of Appeals, but when the judgment was affirmed by the Circuit Court of Appeals on July 20, 1939 (*U. S.* v. *Nardone*, 106 Fed. 2nd, 41) that Court, of its own motion, granted bail conditioned upon the filing of a petition for a writ of certiorari to this Court (106 Fed. 2nd, at p. 44).

The Trial.

The indictment charged and the Government attempted to prove that appellants, among others, formed a plan in January of 1935 whereby they would cause alcohol manufactured in Belgium to be transported by a freighter, the *Isabel H*, to points relatively near the eastern coast of the United States, and to cause that alcohol thereafter to be transferred to smaller vessels, the *Pronto* and the *Southern Sword*, to be smuggled into the United States. It was alleged that a cargo of alcohol was thus transferred to the *Southern Sword*, then in radio communication with the co-conspirator Geiger, allegedly an employee of the defendants, and under the command of the defendant Brown. The alcohol is said to have been transferred from

the *Southern Sword* to a vessel owned by one Mathiasen, and by that vessel to have been brought into the Port of New York on March 17, 1936.

In the first trial, the Government called as witnesses agents who had "tapped" telephones used by the defendants. These witnesses were permitted to testify to the contents of those conversations. That was held reversible error.

From December 22, 1935 to the end of March, 1936, three Government agents devoted all their time to listening in on telephones used by the defendants, and during that period, overheard no less than 650 conversations. The Chief Investigator stated during the course of the abortive hearing permitted by the Trial Judge that the Government had a suspicion that members of an unidentified group known vaguely as "The International Ring", and suspected of smuggling alcohol, were congregating in the lobby of the Hotel Astor in New York City and using the public telephones there. The very identity of the defendants themselves was revealed only by the interceptions. The Government's agents learned of the proposed acts which are the crimes alleged in the indictment only by these same interceptions.

At the second trial, now under review here, these witnesses were not called to testify but use was made of these interceptions in the preparation by the Government for the second trial, and was the whole basis of the Government's proof during that trial. The first witness called was the radio operator, GEORGE GEIGER. He had not been called as a witness on the first trial; the Government there proved through the intercepting agents, the contents of conversations to which he had been a party. The defendants immediately objected to questions addressed to Geiger to elicit testimony of these conversations and moved to strike out that testimony upon the ground that it

> " 'was obtained by the unlawful interception of telephone and telegraph messages, by the process com-

monly known as wire-tapping, in violation of Section 605 of the Federal Communications Act, that the existence of the witness, the fact that he was a witness to some of the transactions and the relations between the defendants and of the witness with the defendants and other persons alleged to be cooperating with them was revealed by the unlawful interceptions of telephone and telegram messages and that the Government used the records of these interceptions in preparation for this trial and for obtaining other witnesses and other evidence against the defendants.' The Court then announced that this matter would be taken up later in the trial." (Record, p. 46.)

This objection being overruled, they offered to prove that the testimony was the direct result of the interception (Record, pp. 49, 55). The Court denied the application and stated that the defendants "should wait" (Record, p. 55). The same objection and the same offer were made in respect of the testimony of the witness Kleb, a co-conspirator. But the Court again denied the defendants the opportunity they sought (Record, pp. 86; 94). So, with the witnesses Steinfeldt (Record, p. 142) Lancaster, Strumill and others (Record, p. 301). Upon the conclusion of the Government's case, the Court permitted the defendants to begin an inquiry for the purpose of demonstrating the immediate connection between the telephone interceptions and the procurement by the Government of the testimony of these witnesses. The attitude of the Court was then explained by the statement that the offer could not properly have been made, or the question even raised, until all of the Government's proof was in (Record, p. 266). The hearing which then followed was marked by the growing impatience on the part of the Trial Judge with the effort to demonstrate that connection. As the Circuit Court of Appeals said:

"In substance, the judge stopped the inquiry, * * *."

The Court directed defendants' counsel to do the impossible. He said he would hear only attacks upon specific items of evidence, but barred defense counsel from making the preliminary investigation necessary to show that specific items had been obtained solely by use of the interceptions.

Thus, the question here is not whether defense counsel were successful in discharging the burden they desired to assume, for they were never given that opportunity. But the probability of success in discharging that burden may be judged by comparing the record of the first trial with this record. Upon this trial, the Government called as witnesses three persons named in both indictments as conspirators, not produced as witnesses at the first trial. They are Geiger, Kleb and Lancaster. Their testimony is the essence of the Government's case. Each admitted his participation in the alleged conspiracy, and stated that at the direction of some of the defendants, each participated in acts constituting the substantive crimes.

A striking example of the use of the taps may be found in the fact that the witness Steinfeldt was called in the second trial, but not in the first. He was the owner of a boat which the Government contended the defendants sought to use for the transportation of smuggled alcohol. He was not called as a witness in the first trial, because during that trial, the Government directly produced the record of the telephone conversation of one of the defendants with him. Obviously, his identity was learned through that interception. Equally obviously, the Government prepared its case through the use of that interception, since it was able to find him, communicate with him, review his testimony, and call him as a witness, as a result and only as a result of the interception. The testimony of the witnesses Nillson and Strumill belongs in precisely

the same category. They had been employed by a machinery company; the Government desired to prove that some of the defendants directed necessary machinery parts to be shipped from New York to Yarmouth. In the first trial, this was done by the direct use of the interceptions. On this trial, the witnesses whose identity was learned through the interceptions were called to testify to those same conversations in which they had participated.

Summary of Argument.

The statute forbids the use of information obtained through the interception of telephone messages. Appellants could not have anticipated such use in violation of the statute. Accordingly, appellants' offer to prove the immediate relationship between respondent's proof and the knowledge gained through the interceptions was seasonably made at the outset of the trial. This application should have been granted; in refusing it, the Trial Court precluded itself from determining, as it should have, whether the respondent had proven a vital part of its case by improper use of the intercepted messages. In any event, the respondent failed to prove a *prima facie* case against the appellant Hoffman.

POINT I.

Respondent violated the provisions of Section 605 of the Federal Communications Act by the use it made of the intercepted messages.

In *Nardone* v. *U. S.*, 302 U. S. 379, the Court held on the authority of what may be called Subdivision 2 of Section 605 of the Federal Communications Act, that an agent who had intercepted an interstate telephone communication could not thereafter take the stand as a witness and there recite the contents of that message, because

that act was tantamount to divulging the message in violation of the statute (302 U. S. 382). On that appeal, there was no occasion for the Court to consider the Fourth Subdivision of the Section which not only prohibits any person from divulging or publishing the contents of such a message, but also provides that

> "no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, *or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto;* Provided, That this section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress." (Italics ours.)

The words of the statute are plain and unambiguous. The prohibition against any use of the intercepted messages extends to and includes the Sovereign. *Nardone* v. *U. S.*, 302 U. S. 384. Evidence illegally obtained cannot be used directly or indirectly. No use can be made of it. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all." *Silverthorne* v. *U. S.*, 251 U. S. 385, at 391.

In the *Silverthorne* case, it was held that when evidence had been illegally procured, it could not be used even for the purpose of drawing a subpoena. In *Flagg* v. *U. S.*, 233 Fed. 481, it was held that evidence illegally pro-

cured could not be used as a basis for the preparation of the Government's case. There, the evidence illegally seized was not offered as part of the Government's proof, but the Court reversed the conviction because it seemed that such evidence had served as a basis for procuring secondary evidence and in the preparation for the trial. That ruling was approved by this Court in the *Silverthorne* opinion. *Rogers* v. *U. S.*, 97 Fed. 2nd 691, is a more recent example of the application of the same principle. If documents illegally obtained reveal the existence of companion counterparts, the latter become inadmissible. *Cf., Gouled* v. *U. S,* 255 U. S 298.

That the ban extends to all possible uses is illustrated by *Agnello* v. *U. S.*, 269 U. S. 20. Here the use of illegally obtained evidence not for the purpose of proving the Government's case, but in an effort to contradict a defendant on cross-examination, was held reversible error.

Obviously, if the principle of these cases applies, then the respondent in this case made improper use of the information gained by the telephone interceptions. But the Circuit Court of Appeals suggested, and the respondent may be expected to argue, that the prohibition against the indirect use of evidence illegally obtained extends only to those cases where the illegality consisted of the violation of rights secured by the Fourth Amendment. It is respectfully suggested that that argument is predicated upon a fundamental misconception. Section 605 of the Federal Communications Act is as much a part of the law of the land as is any provision of the Constitution itself, and for that the Constitution is authority. *Article VI, Clause 2, Federal Constitution.* There is implicit in the opinion below the suggestion that a court will pause to investigate the validity of the use of evidence when it is alleged that the manner of its discovery violated the Constitution, but that if evidence was procured by violating a lesser authority, as possibly a statute, such investigation will not be made. This Court has never pronounced such

a rule, and certainly the distinction would not be consistent with the pronouncement of Clause 2 of Article VI of the Constitution. This Court has said that where investigation as to the source is necessary in order to prevent the rights assured by the Fourth and Fifth Amendments from degenerating into a form of words, such investigation must be made. The rights assured by Section 605 of the Federal Communications Act stand upon the same footing and are entitled to the same security, and can no sooner be permitted to degenerate into a form of words than the rights secured by the Fourth and Fifth Amendments.

Finally, it is said in the opinion below that appellants had no right to the opportunity for the investigation they sought, because the holding of this Court in *Olmstead* v. *U. S.*, 277 U. S. 438, denied them such a right. True, the majority opinion in that case did suggest that under the common law, evidence illegally obtained was not inadmissible for that reason. But the *Olmstead* case dealt with an entirely different situation. There the illegality in the procurement of the evidence rested upon a state statute which made wire-tapping a crime but which did not prohibit the use of the information thus obtained. Here, a federal statute prohibits any use of that information. The majority of the Court thought that *ex parte Jackson*, 96 U. S. 727, which held that seizure and inspection of mailed matter in violation of federal prohibition constituted an invasion of the rights secured by the Fourth Amendment, could be distinguished because the right to secrecy of mailed matter was protected by federal statute whereas the right to equal secrecy for telephonic communication was then not statutory. There is no longer that distinction. There is a closer analogy to the protection of the Fourth Amendment in the privacy sanctioned now by statute for oral communication by electric wire than there is to a paper, possession of which is completely surrendered to the Postal Authorities.

The Circuit Court of Appeals seemed to think necessary to a reversal here that there be a repudiation of the doctrine of the *Olmstead* case. On the contrary, it is submitted that under the authority of the majority opinion in that very case, telephone messages are now entitled to all of the rights of secrecy afforded the mails by the rule of *Ex parte Jackson, supra,* as reiterated in *Olmstead* v. *U. S., supra.* Mr. Justice BRANDEIS dissented (being joined in dissent by Mr. Justices STONE, BUTLER and HOLMES) because he thought no statute was needed as a basis for prescribing such an invasion of privacy. But now there is a statute. A *fortiori* what he then said ought now control.

POINT II.

The Trial Court should have permitted appellants to make a preliminary inquiry into the use made by respondent of intercepted telephone messages, and the request by appellants for such an opportunity was seasonably made at the outset of the trial.

This Court has firmly held to the rule that the Government is not permitted by indirection to violate rights secured by the Constitution. The office of the preliminary inquiry has been to ascertain whether the Government had invaded constitutional rights. Rights secured by statute should be entitled to the same protection. Such a preliminary inquiry seems equally appropriate for demonstration of an indirect violation of the provisions of the Federal Communications Act.

It has not been, but it may be, questioned whether appellants made timely application for such preliminary inquiry. Since *Weekes* v. *U. S.*, 245 U. S. 618, it has been held that where evidence was procured in a manner violative of the Fourth Amendment, and the defendant has knowledge of such seizure, and has opportunity to dispute

the constitutionality of the search, he will be estopped from protesting against the admissibility of the evidence unless he apply for its suppression prior to the beginning of the trial. But this "rule of practice must not be allowed for any technical reason to prevail over a constitutional right". *Gouled* v. *U. S., supra.*

In *Amos* v. *U. S.*, 205 U. S. 313, it was held that the application was not belated if made after the impaneling of the jury, in a case where the evidence had been seized in obvious disregard of the constitutional protection. In *Gouled* v. *U. S., supra,* it was held that the application was timely made at the trial, where the defendant could not have made it earlier since the documents had been taken by stealth and without the defendant's knowledge. In the instant case, appellants made the application as soon as, at the beginning of the trial, they had the first intimation of the respondent's intended use of information gained from intercepted telephone conversations. A determination that the application made at that time was not diligently made must hold that the appellants were under a duty to anticipate a violation of the statute by the Government. On the contrary, they were entitled to proceed on the assumption that the Government would itself obey the law. *Cf., Berger* v. *U. S.*, 295 U. S. 78. Particularly so when in the very case in which this Court had enunciated the applicability of the statute.

POINT III.

Respondent failed to prove a *prima facie* case under any of the counts of the indictment as against appellant Hoffman.

It is earnestly contended on behalf of the appellant Hoffman that as against him, respondent failed to prove a *prima facie* case. Counsel is aware that that matter is beyond the limitations prescribed when the writ was

granted. Yet since this Court has the right, under Section 240 (a) of the Judicial Code as amended, to take cognizance of the argument if upon the whole case it should appear to the Court that the contentions here advanced merit consideration, the point is presented for such attention as to this Court may seem proper.

This Is the Proof Adduced Against Hoffman:

He was seen in the presence of the conspirators on many occasions by the five witnesses Weiss (fols. 294, 295, 298, 302) Parrot (fols. 431, 440, 441) Martin (fols. 472, 474, 478, 494-498) Velez (fols. 540, 640-646) and Dunne (fols. 751-754). Not one of these witnesses was able to recall a single statement made by Hoffman on any of these occasions. So far as these witnesses were concerned, he was merely a by-stander.

Geiger said that LeVeque told Geiger that Hoffman was a partner in the smuggling enterprise, but that Geiger was not to take orders from Hoffman (fol. 100). Geiger was unable to state that Hoffman was present on that occasion (fol. 98). Appellants' motion to strike this testimony was denied and an exception noted (fol. 907).

Lancaster said that on an occasion in December, 1934, which is prior to the inception of the conspiracy as alleged in the indictment, or January, 1935 (the witness was unable to say which date was correct), he, Lancaster, was then in the employ of one Kleb. Lancaster was then working on the boat, the *Monalolo*, and had assisted in bringing in a cargo of smuggled alcohol at a point on the coast of Long Island. On that occasion, said Lancaster, while the alcohol was being moved from the boat to a truck, Hoffman gave Lancaster money with which to buy gasoline for the truck (fol. 308). The incident is anterior to and unconnected with the substantive crimes charged by the indictment. Decision on the motion to strike this evidence was reserved and the motion thereafter denied

and an exception noted (fol. 908). The rule was made upon the theory that the evidence was admissible as indicative of the past commission of a similar crime. Incidentally, the record shows that the *Monalolo* sank early in 1935. It was not one of the boats like the *Pronto* or the *Southern Sword* which had allegedly been used in the movements of alcohol as charged by the indictment. More important is the fact that the Circuit Court of Appeals completely misapprehended the significance of the incident. The Circuit Court of Appeals by its opinion indicates that it thought that the boat that Lancaster was referring to was the *Pronto*. Had it been the *Pronto*, the inference of a close connection between Hoffman and the other defendants might have been justified.

There is thus nothing in the record to justify the conviction of Hoffman on the two substantive counts. The Circuit Court of Appeals said:

> "There was plainly enough to support a verdict against all these men—certainly as to the conspiracy."

No mention was made of the sufficiency of the proof with respect to the substantive counts.

But it is earnestly submitted that even with respect to conspiracy there was a failure of proof as against Hoffman even on the conspiracy count, when the record is analyzed. If it is to be inferred that because he was in the company of smugglers he must therefore have known of their smuggling activities, the knowledge so gained would not make him a conspirator (*Dellaro* v. *U. S.*, 99 Fed. 2nd 781).

Geiger's testimony, if admissible in spite of its hearsay character, is not an adequate substitute for proof of Hoffman's participation in the conspiracy because in any event, it was inadmissible in the absence of independent proof of Hoffman's participation, and because participation of a third person cannot be proved by a declaration of one

conspirator to another, (*Thomas* v. *U. S.*, 57 Fed., 2nd 1039).

What Lancaster said referred to a transaction independent of the crimes charged. There is a conflict in the authorities as to its admissibility in any event. *Heike* v. *U. S.*, 227 U. S. 131; but see *Standard Oil Co.* v. *U. S.*, 221 U. S. 1; *Lancaster* v. *U. S.*, 39 Fed. 2nd 30; *Vendetti* v. *U. S.*, 27 Fed. 2nd, 856. Even those authorities which permit the introduction of this type of testimony do so in spite of the acknowledgment that the proof is not in support of the accusation. Perhaps the jury should have been permitted to hear that in December, 1934, or January, 1935, long before the commission of the crimes charged, Hoffman participated in some way in a different smuggling transaction. But that proof by itself, or even cumulatively, when taken together with proof of Hoffman's association with the other defendants herein and proof that one defendant told another that Hoffman was a participant, is insufficient to support the conspiracy count.

It is respectfully submitted that the Government failed to prove that Hoffman participated in the commission of the substantive crimes; or that he was a party to the conspiracy alleged in the indictment. For this reason, the Court erred in denying his motions to dismiss at the conclusion of the Government's case and at the conclusion of the entire case, and for this reason the judgment should be reversed.

Respectfully submitted,

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